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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

PAZ DE LA HUERTA, Plaintiff and Appellant, v. LIONS GATE ENTERTAINMENT CORPORATION et al., Defendants and Respondents.	B271844 (Los Angeles County Super. Ct. No. SC124294)

APPEAL from an order and judgment of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Affirmed.

Tensor Law and Aaron G. Filler for Plaintiff and Appellant.

Fox Rothschild, David Aronoff and Rom Bar-Nissim for Defendants and Respondents.

Actress Paz de la Huerta appeals from the order partially granting an anti-SLAPP motion as to claims based on the use of a voice double. The voice double was used to dub over her lines in a film. She also appeals from the judgment following the grant of a demurrer as to claims based on a stunt during which she was injured. Appellant argues that she sufficiently showed she could prevail on her voice-dubbing claims, and that her stunt-based claims fall under exceptions to the workers' compensation exclusivity rule. We disagree and affirm.

FACTUAL AND PROCEDURAL SUMMARY

During the filming of the motion picture "Nurse 3D" in October 2011, appellant was subjected to a stunt where she was hit by a moving ambulance. The first take of the stunt was performed without notice, consent, or a safety walkthrough. Appellant was convinced to participate in a second take and was injured when the ambulance struck her. In the movie, appellant's voice was used in 201 dialog parts. In post-production, she was called on to record another 27 off-screen voiceover narration parts, but those parts were later rerecorded using a voice double without appellant's knowledge.

In 2014, the New York State Workers' Compensation Board awarded appellant over $70,000 for her stunt-related injuries. In 2015, her negligence action based on those injuries filed in a New York state court was dismissed. Later that year, appellant filed this action against respondents Lions Gate Entertainment Corporation, Lions Gate Films Inc., IV3D Productions Corporation (producer), Marc Bienstock (unit production manager and producer), Michael Paseornek (production executive), John Sacchi (executive producer), Douglas Aarniokoski (director), Boris Mojsovski (director of photography),

and Layton Morrison (stunt coordinator).[1] She purported to assert two claims related to the stunt: breach of contract based on the failure to notify her and obtain her consent to the initial take, and tortuous breach of the implied covenant of good faith and fair dealing based on fraudulent inducement of her consent to the repeat take. The remaining claims were related to the unconsented voice dubbing: breach of contract, breach of the implied covenant of good faith and fair dealing, and tortuous breach of the implied covenant of good faith and fair dealing; intentional and negligent infliction of emotional distress; common law and statutory right to publicity; and trade mark infringement and dilution.

Respondents demurred to the first amended complaint and moved to strike it under the anti-SLAPP statute (Code Civ. Proc., § 425.16). Appellant opposed. The court denied the motion as to the stunt-based claims, but granted it as to the voice-dubbing claims, finding that the latter claims arose from protected activity and that appellant failed to show she sustained damages. The court denied appellant's request to present oral testimony at the hearing. Subsequently, the court sustained the demurrer as to the stunt-based claims on the ground that they were within the workers' compensation exclusivity rule, to which no exception had been, or could be, pled since the statute of limitation on assault and battery had run.

After the filing of this appeal, the trial court denied appellant's earlier filed motions for reconsideration of the anti-SLAPP motion and demurrer for lack of jurisdiction, as well as for lack of new evidence and argument.

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[1] The stunt and voice double performers have been named as John and Jane Doe respectively. They are not parties to this appeal.

DISCUSSION

I

Under the anti-SLAPP statute, a cause of action arising from a defendant's act in furtherance of a constitutionally protected right of free speech may be stricken unless the plaintiff is likely to prevail on the merits. (Code Civ. Proc., § 425.16, subd. (b)(1).) An anti-SLAPP motion to strike is analyzed in two steps. "Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims 'aris[e] from' protected activity in which the defendant has engaged. [Citations.] If the defendant carries its burden, the plaintiff must then demonstrate its claims have at least 'minimal merit.' [Citations.]" (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061 (*Park*).)

"To establish a probability of prevailing, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 (*Soukup*).) The plaintiff may not rely solely on the allegations of the complaint, even if verified, but must proffer competent admissible evidence in opposition to the motion. (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699; *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 673.) The motion must be granted if "'the allegations made or the evidence adduced in support of the [plaintiff's] claim, even if credited, are insufficient as a matter of law to support a judgment . . . .' [Citation.]" (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1238 (*Tuchscher*).)

We review an order denying an anti-SLAPP motion de novo. (*Soukup*, *supra*, 39 Cal.4th at p. 269, fn. 3.) "[W]e must

credit all *admissible* evidence favorable to [appellant] and indulge in every legitimate favorable inference that may be drawn from it." (*Tuchscher*, *supra*, 106 Cal.App.4th at p. 1238.) We need not accept argumentative and speculative claims (*ibid.*), and we may affirm for reasons different from those given by the trial court. (*Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 479.)

A. Protected Activity

Appellant relies on the recent decision in *Park*, *supra*, 2 Cal.5th 1057 to argue that the unconsented dubbing over her voice was not a protected artistic activity because it breached her employment contract. *Park* does not support that argument. The court in *Park* held that an action challenging a tenure decision did not fall within the purview of the anti-SLAPP statute because a tenure decision is not a protected activity even though statements made in connection with the peer review process leading to such a decision would be protected. (*Id*. at p. 1070.) The court drew a distinction between protected activities "that form the basis for a claim," which bring the claim within the anti-SLAPP statute, and "those that merely lead to the liability-creating activity or provide evidentiary support for the claim," which do not implicate the statute. (*Id*. at p. 1064.) As the *Park* court explained, speech or petitioning activity does not lose its protected status under the anti-SLAPP statute if it forms the basis of a breach of contract claim; to the contrary, it falls within that statute precisely because it forms the basis for such a claim. (*Id*. at p. 1064.)

Here, appellant's claims arise from the decision to use a voice double to rerecord lines originally read by a well-known lead actress in a widely reviewed film. That is a creative decision implicating a matter of public interest and hence within the scope of the anti-SLAPP statute. (See Code Civ. Proc., § 425.16, subd.

(e)(4) [anti-SLAPP statute protects "conduct in furtherance of the exercise of . . . the constitutional right of free speech in connection with . . . an issue of public interest"]; *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1257 [actors are public figures for achieving reputation or notoriety by appearing before public]; *Hunter v. CBS Broadcasting, Inc.* (2013) 221 Cal.App.4th 1510, 1521 [casting weather anchor is activity that furthers free speech in connection to issue of public interest]; *Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 143 [creating T.V. show is exercise of free speech on matter of public interest].) Whether or not appellant's consent to the voice dubbing was necessary and whether she suffered any damages go to the merits of her claims, not to the protected nature of the decision. (See *Hunter*, at p. 1526.)

B. Probability of Prevailing on the Merits

Appellant challenges the trial court's finding that she offered no proof of damages from the voice dubbing. In *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, the court held that proof of actual damages is necessary to oppose an anti-SLAPP motion to strike a breach of contract cause of action, whether or not damages were the focus of the motion. (*Id.* at p.775; but see *Midland Pacific Building Corp. v. King* (2007) 157 Cal.App.4th 264, 275 [absent actual damages, plaintiff may be entitled to nominal damages for breach of contract].) Appellant has not shown that she has suffered ascertainable breach of contract damages, and she does not argue that she is entitled to nominal damages. Rather, on appeal, she claims to have suffered damages because of "trademark confusion" that caused her "severe emotional distress" because viewers mistook the voice double's "incompetence" as her own. We find these claims unsupported by admissible evidence, and deficient as a matter of law. We also find unconvincing appellant's claims that her

employment contract gave her control over the redubbing, and that respondents breached that contract in dubbing over her voice.

1. Breach of Contract

It is undisputed that the performer's contract appellant signed allows IV3D Productions Corporation "to dub or simulate" her voice, "in whole or in part when, in Company's sole discretion, the Picture artistically or otherwise, requires such a dubbing (subject to the SAG [Screen Actors Guild] Agreement)." Appellant relies on the limitations on the producer's discretion to use a voice double imposed by the SAG agreement. Although portions of the SAG agreement have been included in the record on appeal, the language on which appellant relies has not been completely reproduced. Nevertheless, the parties agree that one of the conditions for the use of a voice double in the SAG agreement is "[w]hen the performer fails or is unable to meet certain requirements of the role, such as singing or the rendition of instrumental music or other similar services requiring special talent or ability other than that possessed by the performer." The parties disagree whether this condition allows dubbing over an actor's voice if the producer is dissatisfied with the actor's reading of her lines.

Contract interpretation is an issue of law, and we look to the language of the agreement in order to ascertain its plain meaning. (*Fireman's Fund Ins. Co. v. Superior Court* (1997) 65 Cal.App.4th 1205, 1212.) The condition in the SAG agreement is not limited by the specific examples listed after the phrase "'such as'" because that "'is not a phrase of strict limitation, but is a phrase of general similitude indicating that there are includable other matters of the same kind which are not specifically enumerated.' [Citation.]" (*Shaddox v. Bertani* (2003) 110 Cal.App.4th 1406, 1414; see also *Aroa Marketing, Inc. v. Hartford*

Ins. Co. of Midwest (2011) 198 Cal.App.4th 781, 788–789.) Thus, if appellant failed to meet any of the requirements for the role, the SAG agreement allowed respondents to use a voice double.

Appellant assumes that the condition in the SAG agreement is not met "since she was able to speak her own voice," and respondents have not claimed otherwise. However, respondent Paseornek has declared that appellant's reading of the off-screen voiceover narration parts during post-production was considered unsatisfactory. Appellant has offered no evidence to the contrary. The undisputed evidence, therefore, shows that appellant failed to meet certain requirements of the role.

Appellant also relies on the provision in the performer's contract requiring that the actor be given first opportunity to dub in English. It is undisputed that appellant was given such an opportunity when she was allowed to record the voiceover parts that were added during post-production. Nothing in the language of the agreements on which appellant relies requires that she be given repeat opportunities to improve on her performance.

Appellant has failed to show that using a voice double constituted a breach of contract. Her claim for breach of the implied covenant of good faith and fair dealing is duplicative and fails for the same reason. (See *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395.)

2. Evidence of Viewer Confusion

Appellant's main argument on appeal is that she is entitled to damages based on the claimed inferiority of the voice double's performance, which viewers mistakenly attributed to appellant. To establish viewer confusion, she relies on the operative complaint, which quotes a film review by Ed Gonzalez, describing her "*somnambulistic delivery* of beyond-purple lines, such as 'They are like diseased cells cultured in alcohol petri dishes.'"

The complaint alleges the reviewer was unaware the quoted line was spoken by the voice double. Alternatively, appellant relies on Gonzalez's affidavit submitted in relation to the motion for reconsideration, where he states his belief that the line was spoken by appellant.

Gonzalez's affidavit is not properly before us as it was not filed and considered in relation to the opposition to the anti-SLAPP motion. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 405, 413–414; *Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.) Nor is it properly before us as part of appellant's motion for reconsideration, in support of which it was filed, since the trial court had no jurisdiction to consider that motion after appellant filed her notice of appeal. (See *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189–190; *Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35, 53.)

Appellant's opposition to the anti-SLAPP motion cannot be based solely on the allegations in the complaint, as those allegations are not a substitute for admissible evidence. (*Navellier v. Sletten*, *supra*, 106 Cal.App.4th at pp. 775–777.) In reply, appellant argues that since the complaint referred to Gonzalez's review through its Internet address, and respondents filed the review with the court in support of the anti-SLAPP motion, the review may be used to support her opposition to the motion as well. Normally, we do not consider points raised for the first time in the reply brief. (*Tellez v. Rich Voss Trucking, Inc.* (2015) 240 Cal.App.4th 1052, 1066.) Even were we to accept appellant's point that on appeal she may rely on evidence submitted by respondents, that evidence does not support her claim for damages based on the voice double's performance.

Read as a whole, Gonzalez's review is not critical of the dubbed portions per se. Rather, the reviewer is disappointed in the film's message—namely, that the character appellant

portrayed (a murderous nurse luring "ostensibly dangerous predators") is not subversive of gender stereotypes, but is "little more than a product of the same male fantasies she rebels against." The character's "artifice," according to the reviewer, is rendered "unconvincing" not only because the delivery of lines is "expectedly somnambulistic," but also because appellant is "ever-nude" and the lines are "beyond-purple"—aspects that have nothing to do with the voice dubbing.

The particular line from the film quoted by Gonzalez, on which appellant bases her claim for damages, is offered as one example of many lines, but there is no evidence that all lines Gonzalez had in mind were read by the voice double, or that Gonzalez found the "somnambulistic" delivery to be incompetent. Other reviews offered by respondents described appellant's "over-the-top delivery" as perfectly fitting the "underlying campiness of the plot" and her speaking "as if heavily drugged" as "entirely deliberate," without distinguishing among particular lines. Even the clearly negative reviews cited in the operative complaint do not single out particular lines from the film; rather, they generally criticize the quality of delivery of "all of her line readings" and "each line of dialogue," indicating a uniform quality of delivery.

Respondents' uncontradicted evidence belies appellant's allegation in the complaint that "essentially her entire role in the movie" was dubbed over. As appellant conceded in her opposition, only 11.8 percent of her speaking parts were substituted. The evidence does not indicate that viewers noticed any difference in quality between lines spoken by appellant and those spoken by the voice double.

3. Right to Publicity and Trademark Dilution

The argument that damages may be presumed because the use of appellant's name or voice in the film infringed on her right

to publicity, or was likely to result in trademark dilution, fails to persuade. Appellant has not stated causes of action for trademark infringement and dilution, or for publicity right violation, as such claims, if cognizable at all in appellant's case, are either preempted by federal copyright law or subject to the defense of consent.

Fleet v. CBS, Inc. (1996) 50 Cal.App.4th 1911 is instructive. In that case, two actors argued that CBS, Inc., violated their right to publicity by the unauthorized use of their "name, voice, photograph, likeness or performance" in a motion picture due to various alleged breaches, including the redubbing of one actor's speaking parts without his permission. (*Id*. at p. 1915.) The *Fleet* court concluded that the claims were preempted because the actors' likenesses were captured on film through their "dramatic performances," which were copyrightable. (*Id*. at pp. 1920–1921.) It distinguished false celebrity endorsement cases "where the defendant uses a lookalike or soundalike," and "the person whose voice or image is being imitated may state a claim for misappropriation of publicity rights. (See, e.g., *White v. Samsung Electronics America, Inc.* (9th Cir. 1992) 971 F.2d 1395; *Midler v. Ford Motor Company* (9th Cir. 1988) 849 F.2d 460.) The state law claims in these cases were not preempted because it was plaintiffs' image or likeness—and not his or her copyrightable dramatic or musical performance—which had been appropriated." (*Fleet*, at p. 1921.) The court also distinguished *Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, on which appellant relies, as in that case the defendants "used a photograph of the well-known actor Clint Eastwood, along with his name and likeness, to sell their newspaper. Since neither his name nor his likeness and image as portrayed in the photograph were copyrightable, no issue of preemption arose. The same was true in *Abdul-Jabbar v. General Motors Corp.* (9th Cir. 1996) 85

F.3d 407, wherein defendants used the name 'Lew Alcindor' in a television commercial without consent." (*Fleet*, at p. 1921.)

The appellants in *Fleet* cited those cases "for the proposition that where 'the plaintiff neither owns, nor claims to own, the copyright, there is no preemption and the plaintiff is entitled to pursue his or her claim for wrongful appropriation of the rights of privacy and/or publicity even though the medium in which the offending misappropriation has occurred is itself, copyrightable or even copyrighted.'" (*Fleet*, *supra*, 50 Cal.App.4th at p. 1921.) The *Fleet* court explained that the appellants misunderstood "the lesson to be drawn from the cases. In each of the cited cases, the right sought to be protected was not copyrightable—Clint Eastwood's likeness captured in a photograph; Kareem Abdul-Jabbar's former name; Bette Midler's distinctive vocal style; Vanna White's distinctive visual image, etc. The plaintiffs in those cases asserted no copyright claims *because they had none to assert*. Here, by contrast, appellants seek to prevent CBS from using performances captured on film. These performances were copyrightable and appellants could have claimed a copyright in them. . . ." (*Id.* at pp. 1921–1922.)

Appellant's claims are indistinguishable from those in *Fleet*. She variously claims that respondents misappropriated her name or voice, or misused her persona, when they distributed the film after using a voice double. She seeks $55 million in damages and an injunction requiring respondents to redub the film using her voice and remove from circulation copies of the original. However, respondents did not use appellant's name or voice independently of her own performance in the film, and it is undisputed that appellant agreed her performance was "work made for hire" under the 1976 Copyright Act (17 U.S.C. §§ 101, 201). She also expressly consented to the use of her name, voice, and likeness in relation to the film.

The partial dubbing over of appellant's voice does not vitiate her consent to the use of her name and voice in relation to the film as a whole since all agreements on which she relies allow the use of a voice double. In light of her consent and actual performance in the film, appellant may not rely on principles relevant to the unauthorized use of celebrity marks to falsely endorse products, or on principles generally relevant to trademark law. (See, e.g., *Waits v. Frito–Lay, Inc.* (9th Cir.1992) 978 F.2d 1093, 1110, abrogated on another ground in *Lexmark Intern., Inc. v. Static Control Components, Inc.* (2014) 134 S.Ct. 1377, 1385 [false endorsement claim based on *unauthorized* use of celebrity's identity alleges misuse of trademark], but see *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 338–339, 342–344 [distinguishing false endorsement cases that loosely refer to celebrities' "marks" for purposes of the Lanham Act, 15 U.S.C. § 1125(a)(1), from trademark claims under § 1125(c), which require proof that celebrity name acquired "secondary meaning" in relation to specific entertainment services].)

4. Emotional Distress

Appellant has not established entitlement to tort damages for what is in essence a contractual dispute over the circumstances under which a voice double may be used. Despite the heightened rhetoric in the operative complaint, appellant proffered no evidence that respondents intentionally breached her employment contract "'intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages.' [Citation.]" (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 553–554.) Neither is there evidence that appellant suffered any actual emotional distress from the dubbing of her voice. (See *Austero v. Washington National Ins. Co.* (1982) 132 Cal.App.3d

408, 417, disapproved on another ground in *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 816–817 ["'[E]motional distress is a form of actual damage and must be proved as any other actual damage'"].) As we have explained, appellant may not oppose the anti-SLAPP motion solely based on the allegations in the operative complaint. (See *Navellier v. Sletten*, *supra*, 106 Cal.App.4th at pp. 775–777.)

Although she argues that "her affidavits were ignored," appellant does not cite to an affidavit stating that she watched the finished film and suffered severe emotional distress from the actual dubbing over her voice. Contrary to counsel's suggestion at oral argument, none of appellant's affidavits in the record on appeal includes a statement to that effect. Since respondents' uncontradicted evidence indicates that appellant's voice was not replaced throughout the entire film, the contrary assumption in the operative complaint is incorrect. The further allegation in the complaint regarding the "excruciating effect" of watching an actress doing a substandard "reading and performance" in "the full length of the one hour and twenty four minute film" is based on that incorrect assumption rather than on evidence of emotional distress caused by appellant's perception of an actual difference in quality between the dubbed-over parts and her own performance.

Appellant argues that the denial of her request to testify at the anti-SLAPP hearing violated her right to a jury trial. However, "[m]otions ordinarily are heard on affidavits, alone. [Citations.] While a court has the discretion to receive oral testimony, it may refuse to do so and may properly rule solely on the basis of affidavits. [Citations.]" (*McLellan v. McLellan* (1972) 23 Cal.App.3d 343, 359.) Appellant's request to testify at the anti-SLAPP hearing was limited to her claim that the director intentionally placed her in danger during the 2011 stunt; she

made no offer of proof with regard to the voice dubbing. Since the court denied the anti-SLAPP motion as to claims based on the stunt, it did not abuse its discretion in denying the request for oral testimony relevant to those claims. To the extent appellant attempts to merge her claims based on the 2011 stunt with her claims based on the 2013 use of a voice double, any connection between those claims is speculative as appellant cites no actual evidence in support of the alleged confrontation with the director about the stunt during post-production.

Since appellant has not shown a probability of prevailing on her voice-dubbing claims, the anti-SLAPP motion was properly granted as to them.

II

When a demurrer is sustained without leave to amend, we determine de novo whether the complaint states facts sufficient to constitute a cause of action, and whether the court abused its discretion in denying leave to amend. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100.) We treat the demurrer as admitting all material facts properly pleaded, but not conclusions of law. (*Aubry v. Tri–City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

Generally under the Workers' Compensation Act (WCA), "when an injured employee is entitled to recover workers' compensation benefits, those benefits constitute the employee's exclusive remedy against the employer and his or her fellow employees. (Lab.Code, §§ 3600, 3601, 3602.) '[T]he basis for the exclusivity rule in workers' compensation law is the "presumed 'compensation bargain,' pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without

having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort." [Citation.]' [Citation.]" (*SunLine Transit Agency v. Amalgamated Transit Union, Local 1277* (2010) 189 Cal.App.4th 292, 303–304 (*SunLine*).)

A. Breach of Contract

"Where 'the essence of the wrong is personal physical injury or death, the action is barred by the exclusiveness clause no matter what its name or technical form if the usual conditions of coverage are satisfied.' [Citation.] In other words, the exclusivity provisions encompass all injuries 'collateral to or derivative of' an injury compensable by the exclusive remedies of the WCA. [Citation.]" (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 813 (*Vacanti*).) On the other hand, "[c]auses of action seeking to recover '[e]conomic or contract damages incurred *independent* of any' workplace injury are . . . exempt from workers' compensation exclusivity. [Citation.]" (*Id.* at p. 814.) For instance, economic damages based on a wrongful termination claim are exempt "because the damages arose out of the act of termination—and not out of an injury to the employee's person." (*Ibid.*)

Appellant argues that her stunt-related breach of contract claims are exempt from workers' compensation, citing *Pichon v. Pacific Gas & Electric Co.* (1989) 212 Cal.App.3d 488, 492 and *SunLine*, *supra*, 189 Cal.App.4th 292, 307–308 for the general proposition that "[t]he exclusivity of workers' compensation does not preclude causes of action for economic or contract damages." Both cited cases involved claims of wrongful termination that "may have caused economic or contract damages independent of any disabling injury." (*Pichon*, at p. 499; *SunLine*, at p. 307.) Even accepting as true appellant's assertion that the film director threatened to terminate her from the project if she refused to follow directions, her stunt-based breach of contract claims are

not based on an actual or constructive termination that caused her to incur economic damages independent of her personal injury. (See *Vacanti*, *supra*, 24 Cal.4th at p. 814, citing *Pichon*, *supra*, 212 Cal.App.3d at pp. 500–501.) To the contrary, as alleged in the operative complaint, appellant was able to finish the film shoot and to dub the film in post-production.

The breaches appellant alleges are of safety-related provisions, which she argues are "intended specifically to mitigate the risk of personal injury": namely, performers must not be placed in hazardous circumstances; non-script stunts must not be "deliberately omitted"; the performer must consent to the stunt; and all stunts must be reviewed by all participants ahead of time to ensure their safe performance. These breaches are not independent of the personal injury appellant sustained; rather, they are what likely caused the unsafe performance of the stunt and appellant's personal injury. (See *Vacanti*, *supra*, 24 Cal.4th at p. 814.)

Similarly, appellant sustained no separate economic damages from the safety breaches; rather, as she argues on appeal, she suffered "consequential damages arising in personal injury" that "caused" her to suffer "economic harms."[2] (See *Vacanti, supra,* 24 Cal.4th at p. 813 [injuries "collateral to or derivative of" compensable injury are subject to workers' compensation exclusivity].) "Employees often suffer economic damages when they suffer workplace injuries or fail to receive

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[2] The operative complaint is not clear about the economic harm appellant claims to have resulted from the safety breaches. In her opening brief, she references affidavits she filed with the trial court to argue that she lost her life savings and has not been able to obtain significant comparable employment as a result of "a spine fracture that resulted in prolonged impairment," in addition to the voice dubbing.

prompt payment of their medical bills." (*Id.* at p. 816.) Yet, they may not "circumvent the workers' compensation system by asserting claims for economic damages even though their claims derive from their workplace injuries." (*Ibid.*) Nor does appellant's characterization of the director's alleged disregard for her safety as "reckless and wanton," or even intentional, give rise to a breach of contract claim unrelated to her personal injury since the underlying injury caused by the safety breaches was first and foremost an injury to her person, not an independent injury to her finances.

B. Intentional Tort

The exclusive remedy provisions of the Workers' Compensation Act do not apply to an employee's personal injury that is proximately caused by a willful physical assault by the employer. (Lab. Code, § 3602, subd. (b)(1).) "Willful" employer assaults include batteries that are specifically intended to injure. (*Soares v. City of Oakland* (1992) 9 Cal.App.4th 1822, 1830; see also *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1010 ["willful and unprovoked physical act of aggression" by coemployee (§ 3601, subd. (a)(1)) requires intent to injure].) If an employee has been assaulted by a coemployee, the injured employee may sue the employer, if the employer ratified the assault and did nothing to discipline the assaulting employee. (*Hart v. National Mortgage & Land Co.* (1987) 189 Cal.App.3d 1420, 1432.)

Appellant alleged that the director fraudulently obtained her consent to the repeated stunt by assuring her that safety modifications would be implemented and instructing her not to look at or step out of the way of the approaching vehicle. Consent to an act that would otherwise constitute a battery "normally vitiates the wrong," unless the consent is fraudulently induced. (*Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 375.) But

while appellant may have sufficiently pled facts negating her consent to the retake of the stunt, the allegations in the first amended complaint are insufficient to state a cause of action for battery with a specific intent to injure. Nor can appellant state a valid cause of action through amendment.

Appellant alleged the director was aware of the "unacceptably high risk of serious bodily harm" during the repeated stunt, speculating that he insisted on a retake because he was displeased with the film and wanted to end it by intentionally battering the main actress, or because he wanted to force her to quit due to artistic differences. At the same time, appellant also conceded that the director might not have wished any actual harm to appellant, but that he nevertheless proceeded to repeat a stunt that "any reasonable person would know" was likely to cause a harmful touching.

While the allegations in the operative complaint run the gamut from negligence to intent to injure, the latter allegations are inconsistent with those in the complaint appellant filed in the earlier New York case. That case was based on the same stunt-related injury; yet, appellant alleged only negligence claims, even though New York, like California, recognizes an exception for intentional torts directed at causing harm to the employee. (See, e.g., *Fucile v. Grand Union Co.* (N.Y. App. Div. 2000) 270 A.D.2d 227, 228; *Acevedo v. Consolidated Edison Co.* (N.Y. App. Div. 1993) 189 A.D.2d 497, 501.) Appellant's belated attempt to plead an intentional tort is barred by res judicata. (See *Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 584 [claims that could have been raised in prior action are barred by res judicata].)

Additionally, as the trial court noted, tort claims for assault and battery are barred by the two-year statute of limitations in

Code of Civil Procedure section 335.1. In reply, appellant attempts to avoid this statutory bar by recharacterizing her claim as one of attempted homicide in order to take advantage of the longer statute of limitation in Penal Code section 800. That attempt is unavailing. Although intentional torts that also constitute crimes against the person under the Penal Code are not subject to the exclusive remedy provisions of the workers' compensation law, that does not mean criminal law statutes may be imported wholesale into workers' compensation law and enforced in a private civil action. (Compare *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 723, fn. 7 [holding that crimes against employee's person fall outside workers' compensation law] with *Torres v. Parkhouse Tire Service, Inc.*, *supra*, 26 Cal.4th at p. 1010 [rejecting suggestion to import rules of criminal law into workers' compensation law without legislative mandate]; see also Civ. Code, § 3369 ["Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or as otherwise provided by law"].)

Because appellant's stunt-based claims are barred, the court properly sustained respondents' demurrer as to them without leave to amend.

DISPOSITION

The order and judgment are affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.